

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

*On Appeal from the District Court of the United States
for the Eastern District of Washington*

BRIEF FOR THE APPELLEE

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN
Assistant United States Attorney

GREEN HUGHES RTG CO. - SPOKANE

FILE

JG-1999

PAUL P. O'BRIEN,



INDEX

	<i>Page</i>
STATEMENT OF JURISDICTION.....	1
ARGUMENT	1
I. The Commodity Credit Corporation did not Own the property taken.....	1
II. The Appellant had no Criminal Intent to Steal the Potatoes in question.....	10
III. Prejudicial Evidence was Erroneously Admitted by the District Court.....	14
CONCLUSION	15

CITATIONS

Cases:

<i>Barcott v. United States</i> , 169 F. (2d) 929.....	10
<i>Borman v. United States</i> , 262 Fed. 26 (CCA 9) ..	5
<i>Canella v. United States</i> , 157 F. (2d) 470.....	10
<i>Davis v. United States</i> , 328 U. S. 528.....	7
<i>Hatch v. Oil Co.</i> , 100 U. S. 124.....	6
<i>Haugen v. United States</i> , 153 F. (2d) 850 (CCA 9)	13
<i>Henderson v. United States</i> , 143 F. (2d) 681.....	10-15
<i>Lotto v. United States</i> , 157 F. (2d) 623 (CCA 8) ..	7
<i>McRae v. United States</i> , 163 F. (2d) 868.....	10
<i>Nye & Nissen v. United States</i> , 168 F. (2d) 846..	10
<i>O'Leary v. United States</i> , 160 F. (2d) 333.....	10
<i>Pasadena Research Laboratories v. United States</i> , 169 F. (2d) 375, c. d. 335 U. S. 853.....	10
<i>Taylor v. Mississippi</i> , 319 U. S. 583.....	10
<i>Tedesco v. United States</i> , 118 F. (2d) 737.....	15
<i>United States v. Haugen</i> , 58 Fed. Supp. 436.....	6

Statutes:

Title 15 U. S. C. A., Sec. 714.....	1-3
Title 28 U. S. C. A., Sec. 1291.....	1
Rem. Rev. Stat., Sec. 5836-20.....	5

Miscellaneous:

8 Fed. Reg. 16423.....	7
------------------------	---

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MELVIN E. WALLER, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*. } No. 12232

*On Appeal from the District Court of the United States
for the Eastern District of Washington*

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Circuit Court has jurisdiction in the instant case under the provisions of Title 28, Sec. 1291, USCA, and the prosecution in the lower court was based upon Title 15, Sec. 714, USCA.

ARGUMENT

1. Answer to appellant's first specification of error, viz., that the District Court erred in denying the appellant's motions for judgment of ac-

quittal, for the reason that there was no substantial evidence that the potatoes taken by the appellant were owned by the Commodity Credit Corporation at the time they were taken.

This specification of error deals with whether or not potatoes purchased by the Commodity Credit Corporation to relieve an agricultural surplus and sold for livestock feed were owned by the Commodity Credit Corporation at the time of purchase. It is conceded by the appellant that, if the Commodity Credit Corporation purchased and paid for potatoes and took delivery of them, the Commodity Credit Corporation would then own the potatoes. The contention that the appellant makes is that the Commodity Credit Corporation was powerless and impotent to reserve title to potatoes which it sold for livestock feed until the potatoes were actually fed to livestock. Persons purchasing potatoes from the Commodity Credit Corporation signed a contract with the Commodity Credit Corporation giving them the right to purchase No. 1 potatoes for 10c per cwt. for livestock feed. The purchase agreement is set forth as Plaintiff's Exhibit 4 (R. 308) and is supplemented by Plaintiff's Exhibit 5. (R. 310). The following condition is important:

“Use: Purchaser agrees to use the potatoes delivered pursuant to his order for the sole purpose of feeding such potatoes to livestock. Title to the potatoes shall not pass to the purchaser until the potatoes delivered are actually fed to livestock or processed into feed for livestock.”

The purchaser who purchased potatoes signed Plaintiff's Exhibit 4, the Purchase Order, which referred to Plaintiff's Exhibit 5 by reference. The purchaser certi-

fied that he had read Plaintiff's Exhibit 5 and agreed to abide by its terms and conditions. Appellant contends that the reservation of title provision in Plaintiff's Exhibit 5 is illegal and that when the purchaser purchased potatoes for 10c per cwt., he obtained an unqualified right to possession of those potatoes and could do anything he wanted with them as far as the criminal statute, Title 15, Sec. 714(m)(c), was concerned, which provides in part as follows:

“Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished * * *”

The trial court, in passing upon this question, stated as follows:

“In construing the language of this statute I think the Court should regard not only the immediate section here, its language, but also the whole Act of which it is a part; the act which sets up and provides for the activities of the Commodity Credit Corporation provides for the dealing with the problem of agricultural surplus. I think that can be done even in the case of a criminal or penal statute, although they are under the well known rules strictly construed.

“In the first place this statute obviously is not the conventional larceny statute, although it is headed larceny and conversion of property, and it contemplates punishment or interference with the corporation's interest in property, which is obviously much less than the whole ownership as ordinarily contemplated. It provides that whoever shall willfully conceal, remove, dispose of any (189) property owned or held by or mortgaged or pledged to the corporation—while that is not involved here, I think the Court can take into consideration that

in a proper case the penalty provision of this section could be applied to property merely held by the corporation in which it had no other interest except possession; it could be applied to property mortgaged to the corporation; it could be applied to property pledged to the corporation, and with reference to the ownership, I think that we might have a very different situation here if we had the conventional sale and purchase transaction where there was a provision such as is present here of a reservation of title in the seller, but here again I think we have to regard the whole program and its purpose and effect.

"It appears from the evidence here that in this instance the Commodity Credit Corporation, which is an agency of the government acting under the Department of Agriculture of course was buying these potatoes in order to hold up the price, and they bought them at the pegged price of two dollars and something a sack, a hundredweight, and then they turned around, and regardless of the terms of this transaction which is evidenced by exhibit 4, they call it a sale, but who would say that turning potatoes back to the grower at 10 cents a hundredweight, in the sacks, is a sales transaction in the ordinary construction (190) of the term? I think the Court can take judicial notice that new sacks cost more than 10 cents, and regardless of what it may be called, it is in the interest of the whole program, they're permitting a nominal buyer to take this government property and use it for one purpose only, that is, to feed livestock.

"The government could have if they had wanted to, dumped them, burned them, destroyed them, but they thought it was in the public interest to use them as feed, but I think looking at this logically by its four corners, it may be regarded as permission of the government to Mr. Williamson to use these potatoes for the purpose of feeding his livestock, and they remained government property until he had used them for that purpose, and this

language of Form 111, the title shall not pass, there isn't a reservation of title; it's a provision that it shall not pass until the potatoes are delivered or fed to the livestock, and where they're turned over at the nominal sum of 10 cents a hundredweight, these No. 1 U. S. potatoes, worth on the market over \$2.00 a sack, and they're turned over at 10 cents a hundredweight, I don't think you can call this or regard it as a conventional transaction of sale and purchase to which the authorities cited by counsel would properly apply, and I think under those circumstances that it might well be said the government continued (191) to own these potatoes within the meaning of the controlling section here until they were used for the purpose for which they were delivered to Mr. Williamson.

"The government wasn't selling potatoes for 10 cents a sack; it was letting somebody use them at that nominal figure for a purpose which was in line with the government's agricultural program." (R. 176-179).

A sale is nothing other than a contract. Sec. 20 of the Uniform Sales Act, Sec. 5836-20 of Rem. Rev. Stat. of the State of Washington, provides as follows:

"Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer."

The case of *Borman v. United States*, 262 Fed. 26 (CCA 2), is a case analogous to the present case. In that case a conviction was sustained for stealing gov-

ernment property and conspiracy to do the same for clothing upon which the United States had reserved title. The court rejected the contention that title passed out of the United States to the contractor at the time of delivery and purchase. The court in that case cited from *Hatch v. Oil Co.*, 100 U. S. 124, stating that the general rule was said to be that the agreement as to the passing of title is just what the parties intended to make it, if the intent can be collected from the language employed, the subject matter, and the attendant circumstances.

The case of *United States v. Haugen*, 58 Fed. Supp. 436, at page 438, was a case involving the use of fraudulent meal tickets against the Olympic Commissary Company, an agent of the United States. The United States relied upon the title provision in the contract for the purchase of foods which provided that title remained in the United States, although the property was in the possession of the Olympic Commissary Company, which was a restaurant supply house. In this opinion Judge Schwellenbach stated:

“The one exception was proof in the form of invoices for food which contained a stipulation that title passed to the United States upon delivery to the Olympic Commissary Company. If this defendant were charged with stealing food belonging to the Government, this invoice evidence would be sufficient.”

In the *Haugen* case the language in the purchase forms gave the United States title to the food when purchased. In the case at issue, the language used in the sales order certainly reserved title in the United States until the potatoes were used for livestock feed.

In several recent cases decided during the war, particularly cases involving the Office of Price Administration, title to rationing coupons, books and documents had remained property of the Office of Price Administration while possession of the coupons, books and documents have been entrusted to other people. This is particularly true of gasoline ration coupons and a conviction of larceny for unlawful possession of gasoline coupons has been sustained when the coupons were obtained contrary to regulation. The regulation prescribed by the Administrator of the Office of Price Administration, being Sec. 1394.8104(a) of Ration Order 5C, 8 Fed. Reg. 16423, provided as follows:

“All coupon books, bulk coupons, inventory coupons, other evidences . . . are, and when issued shall remain, the property of the Office of Price Administration. The Office of Price Administration may refuse to issue, and may suspend, cancel, revoke, or recall any ration and may require the surrender and return of any coupon book, bulk coupon, inventory coupons or other evidences . . . during suspension or pursuant to revocation or cancellation, whenever it deems it to be in the public interest to do so.”

The Supreme Court, in the case of *Davis v. United States*, 328 U. S. 528, at page 588, stated:

“The coupons remained the property of the Office of Price Administration and were at all times subject to recall by it.”

The case of *Lotto v. United States*, 157 F. (2d) 623 (CCA 8), is a case involving larceny of gasoline ration coupons. The contention the appellants made in that case is similar to the contention appellant makes in

this case, that the ration coupons never did constitute Government property, but the court held that under administrative regulations the coupons remained the property of the Office of Price Administration.

The contention was also made that the provisions of the Second War Powers Act, making gasoline rationing coupons Government property, constituted an unconstitutional delegation of legislative powers. Again that question was resolved against the appellants. Although gasoline rationing coupons had long passed out of the Government's hands into the hands of a third party, still they remained Government property to the extent that a charge of larceny of Government property could be based upon the theft of coupons from private individuals.

In this case there can be no dispute but that the Commodity Credit Corporation owned the potatoes when it bought them from the growers. The appellant contends that the reservation of title in the potatoes by the Commodity Credit Corporation was illegal, that it could not hold title to the potatoes for any purpose after it sold them, but certainly Congress, which created the Commodity Credit Corporation for the purpose of dealing with agricultural surpluses, was given the right to provide for the control and distribution of those surpluses. Any other interpretation would not be in accord with recent decisions of the courts in regard to protecting a lawful function of the Government against depredations of wrongdoers.

It is a matter of common knowledge that the Commodity Credit Corporation purchased millions of tons

of No. 1 potatoes, to withdraw them from the market, at a price in excess of \$2.00 per cwt., in order that the growers might obtain a fair profit on their crops of potatoes. If the Commodity Credit Corporation was impotent to prevent the use of these potatoes for human consumption, no purpose would be subserved by their buying the potatoes as they would be back upon the market a second time either for sale to the Commodity Credit Corporation again or to some other purchaser. Indeed the same load of potatoes might be sold a number of times to the Commodity Credit Corporation and purchased for livestock feed and then if, as appellant contends, the purchaser has absolute title to them, he can sell them wherever he wants so that the whole potato price support program would break down. Certainly the Secretary of Agriculture and the agents of the Commodity Credit Corporation had that thought in mind when they provided that the potatoes could only be sold for livestock feed and that title to the potatoes would remain in the Commodity Credit Corporation until that purpose was subserved.

As has been pointed out, the question as to when title passes in the sale is a matter of contract. The purchaser and seller can determine that for themselves by written agreement. Certainly it is not against public policy for the purchaser and seller in any contract to provide in a written agreement for the passing of title at a specific time.

If the position taken by appellant is correct, once potatoes are sold by the Commodity Credit Corporation for livestock feed, the Commodity Credit Corporation

loses all control over them contrary to the written contract between the Commodity Credit Corporation and the purchaser. None of the cases cited by appellant under this specification of error touch upon facts similar to this where the parties have expressly contracted that title shall remain with the Commodity Credit Corporation, the vendor, until used for the specific purpose of livestock feed.

2. Answer to appellant's second specification of error, viz., that the District Court erred in denying the appellant's motions for judgment of acquittal, for the reason that there was no substantial evidence that appellant took the potatoes in question *with intent to steal* them from the Commodity Credit Corporation or from anyone.

It is submitted that this Court, in reviewing the record, at this time must take the view of the evidence which is the most favorable to the Government and accept as true all the facts which the evidence reasonably proved.

Taylor v. Mississippi, 319 U. S. 583;
Henderson v. United States, 143 F. (2d) 681;
Canella v. United States, 157 F. (2d) 470;
O'Leary v. United States, 160 F. (2d) 333;
McRaye v. United States, 163 F. (2d) 868;
Nye & Nissen v. United States, 168 F. (2d) 846;
Pasadena Research Laboratories, Inc. v. United States, 169 F. (2d) 375, c. d. 335 U. S. 853;
Barcott v. United States, 169 F. (2d) 929.

The appellant admitted that on August 23, 1948, he was directed by one Charles F. Williamson, a potato grower, to haul stock feed potatoes from a packing shed to Williamson's stock feed lot south of Sunnyside, where potatoes were being fed to Williamson's cattle. The appellant admitted that his employees were shielding the potatoes with a tarpaulin against the hot summer sun as they were taken from the warehouse, which is not done with potatoes destined for animal food. The appellant admitted that he, personally, with his employees, proceeded to the Williamson feed lot at midnight on August 23, 1948, started to work by gasoline lantern until 3:00 a.m. on August 24, and that the potatoes were then transferred from branded potato sacks into plain sacks without any identification, then reloaded on a van truck and hauled back to Sunnyside. The appellant admitted that late that night at his direction a full truck load of potatoes, consisting of 323 sacks, was hauled to Portland. Later the 323 sacks were sold at \$2.10 per cwt., or a total of \$678.30. (R. 328).

The check for the potatoes was made out to Kenneth Hathaway, the appellant's brother-in-law, cashed by the appellant, and the proceeds went into the appellant's pocket. The appellant did not testify that Williamson, the grower and purchaser of these potatoes, ever gave him permission to take the potatoes to Portland. The specific directions of Williamson, to the contrary, were to take the potatoes to the feed lot and dump them for animal food. The appellant, although admitting the physical facts connected with the shipment of the stock feed potatoes from Sunnyside to

Portland, and the sale to a wholesale potato dealer, denied any intent to steal any property of the Commodity Credit Corporation or from Charles F. Williamson, the purchaser of the stock feed potatoes. The appellant attempted to show that he was such a close friend of Williamson that there would be no probability that he could commit a crime of larceny against Williamson. The facts as to his friendship with Williamson were submitted to the jury. The only question which the Court refused to let Williamson answer was the following question, which was a conclusion:

“Q. By reason of your friendship could Mel Waller possibly steal anything from you?

“A. No, sir.

“MR. ERICKSON: Object to that.

“THE COURT: Don’t answer the questions until they’re ruled on. I’ll sustain an objection to that, and order that it be stricken from the record and the jury instructed to disregard it. That’s a conclusion of the witness, and not proper.” (R. 181, 182).

The appellant was permitted to testify as to the nature of his friendship with Williamson and transactions back and forth.

The appellant knew that the potatoes were not his. He must have known that they were potatoes purchased under the Commodity Credit Corporation Act, because he was president of a trucking firm in Sunnyside which was one of the leading potato growing districts in the state of Washington, and his trucking firm was engaged to a large extent in the trucking of potatoes. Although perhaps he did not know of the intricacies of the price

support program and the title reservation policy of stock feed potatoes, the jury certainly had a right to find that he had reasonable knowledge that stock feed potatoes could not be sold for human consumption. Almost everyone knew of the 1948 potato price support program. Tremendous quantities of potatoes were purchased by the Government to remove the surplus from the market and keep the price at certain levels for the benefit of the potato growers. Certainly the jury had a right to resolve this fact against the appellant.

Even though the appellant did not know that the potatoes were Government potatoes or Commodity Credit Corporation potatoes until they were actually fed to the livestock, he did certainly know that the potatoes were not his. Williamson testified specifically that the potatoes were directed to be taken to his feed lot for stock feed, as indicated by the following question:

“Q. And what instructions did you give Melvin Waller about hauling those potatoes for stock food; what were your instructions to him?

“A. I told him to haul them out to my cattle out the other side of Sunnyside.” (R. 74).

When Waller took the potatoes from the feed lot he violated his trust with Williamson. Whether he thought he was stealing Government potatoes or Commodity Credit Corporation potatoes or Williamson’s potatoes is immaterial. A thief who steals property, knowing that it is not his, is nevertheless guilty of a Federal charge if the property turns out to be property of the United States. *Haugen v. United States*, 153 F. (2d) 850 (CCA 9).

The appellant's argument under this assignment of error was addressed to the jury. The jury rejected it. It is believed that it is improper for this court to consider it at this time.

3. Answer to appellant's third specification of error, viz., that the District Court erred in denying appellant's motion for a new trial upon the ground of an erroneous admission of plaintiff's exhibit No. 12 in evidence, to the prejudice of the appellant.

Plaintiff's Exhibit 12 was a contract dated August 25, 1948, whereby the appellant, Melvin Waller, purchased 410,000 pounds of fresh Irish potatoes to be delivered at 50 tons per day. (R. 325, 327). The date was August 25, 1948. Since the appellant denied he had any felonious intent when he sold the stock feed potatoes in Portland, Exhibit 12 was an important bit of evidence bearing upon his intent. All the other elements of the crime were admitted, except the appellant's intent. On the 25th day of August, 1948, the same day that the load was delivered in Portland and the check received for \$678.30 from Caruso for the first load of stock feed potatoes, the appellant signed another contract to buy 410,000 pounds of potatoes. If he sold the potatoes in this contract at the same figure as the other was sold, his gross profit in the operation would be \$8,200. This was a very important piece of evidence to show the intent of the appellant at the same time of the sale of the stock feed potatoes. Caruso's check for the stock feed potatoes was dated August 25, 1948. (Plaintiff's Exhibit No. 17, R. 329). If the deed is even committed prior or subsequent to the time charged, it is admissible, to show the state of mind or the intent

of the appellant. Here, the two transactions were on exactly the same date. The indictment charges that the theft occurred on August 23, but the evidence showed that it was a continuing offense beginning on the 23rd and ending on the 25th of August. Although appellant's contract on August 25, 1948, with the Commodity Credit Corporation is not another offense in itself, even if it were evidence of another similar offense, it is admissible to show intent. *Henderson v. United States*, 143 F. (2d) 681 (CCA 9); *Tedesco v. United States*, 118 F. (2d) 737 (CCA 9).

CONCLUSION

It is respectfully submitted that the judgment should be affirmed because the evidence in this case shows that the Commodity Credit Corporation retained title to the potatoes until they were actually fed to livestock or processed into feed for livestock. In addition, there was ample evidence on which the jury could base the finding of guilt.

Respectfully,

HARVEY ERICKSON

United States Attorney

FRANK R. FREEMAN

Assistant U. S. Attorney

Attorneys for Appellee.

